Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment to the Commissions Rules Regarding a Plan for Sharing the Costs of Microwave Relocation	)	WT Docket No. 95-157
	)	RM-8643

REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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SUMMARY

Speedy relocation of the microwave incumbents occupying the 2 GHz band is crucial to the deployment of broadband PCS services and products to the public. CTIA supports the restructuring of the FCC's microwave relocation rules to facilitate rapid delivery of the next generation of wireless services, and urges the Commission to change or modify the existing rules to equalize the bargaining power of microwave incumbents and PCS licensees.

CTIA supports the use of private cost-sharing agreements as another readily available means of advancing the process of relocation. In the absence of a clearinghouse to administer and manage the cost-sharing obligations of PCS licensees, already some wireless companies, such as AT&T Wireless, Wireless Co., PhillieCo., PCS PrimeCo., and GTE Mobile have entered into a cost-sharing agreement for the costs associated with clearing microwave incumbents from the 2 GHz band. Such initiatives incorporate many of the principles advanced by the FCC's cost-sharing proposal and foster the goal of speedy relocation.

In addition, the clearinghouse should be managed by an independent, third-party group that is not associated with any industry segment. The avoidance of the appearance of favoritism is extremely important. Qualified parties, those who neither currently hold an FCC licensee or who have commented in the PCS proceeding, should be allowed to bid to become clearinghouse manager and the lowest bid should be permitted to operate the clearinghouse.

The FCC should adopt a single interference standard that is to be employed by carriers in determining if a subsequent PCS licensee has an obligation to reimburse the initial PCS licensees for relocation. The interference standard should be used by all carriers, regardless of whether they submit to the clearinghouse for reimbursement or enter into private-party arrangements. Further, the valuation of depreciation associated with reimbursement rights should begin on the date that PCS service in the newly acquired band is "technically" feasible, *i.e.*, the date that service is possible. This approach reduces the uncertainty associated with other time frames because it provides subsequent PCS licensees with a date certain from

which to value the reimbursement rights obtained by initial PCS licensees.

Moreover, "good faith" negotiations should be required during the voluntary negotiation period. The Commission has not established any parameters for negotiations during the voluntary period. Some incumbents are, therefore, taking the position that they are not required to engage in "good faith" negotiations during the voluntary negotiation period. The current rules favor the incumbent which results in requests for excessive fees and other unreasonable demands. These dilatory tactics are slowing down the relocation process. The FCC should modify the voluntary negotiation period by shortening it to one year, extending the "good faith" requirement into the time remaining for the voluntary period, or requiring incumbents to bear their own costs of relocation at the end of the voluntary negotiation period (similar to the plan adopted by the Canadian government).

Further, the term "comparable facilities" should be more specifically defined to provide clarity to the rules and assist the negotiation process. "Comparable facilities" should mean "facilities whose overall quality is equal

within a reasonable range so that voice and data users will perceive no qualitative difference between the original and replacement facilities." This definition does not require identical facilities. In addition, state-of-the-art equipment should not be required during the mandatory negotiation period. Incumbents should not be rewarded for thwarting the relocation process by the promise of receiving the same benefits during the mandatory period that they receive during the voluntary negotiation period.

Finally, the FCC should not permit microwave incumbents to return to their original spectrum position at the conclusion of the 12-month test period. Although the requirement to provide "comparable facilities" is not extinguished once an incumbent is relocated, the requirement does not mean that incumbents are entitled to return to their original position. In addition, CTIA favors the cessation of continued licensing in the 2 GHz band. The rights of the 2 GHz microwave incumbents must be tolled on April 4, 2005. Continuation of licensing is a breach of faith to the PCS licensees that have invested billions of dollars to provide the next generation of wireless services to the public. PCS licensees must be assured that their

services will not be compromised by the continual grant of co-primary licenses in the 2 GHz band.

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REPLY COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association ("CTIA")[1] hereby submits its Reply to the comments filed in response to the Commission's *Notice* in the above-captioned proceeding.[2]

Speedy relocation of the microwave incumbents occupying the 2 GHz band is crucial to the deployment of broadband PCS services and products to the public. CTIA supports the restructuring of the FCC's microwave relocation rules to facilitate rapid delivery of the next generation of wireless services. To reach this goal,

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including cellular, personal communications services, enhanced specialized mobile radio, and mobile satellite services.

[2] *Notice of Proposed Rulemaking*, Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157 and RM-8643, FCC 95-426, released October 13, 1995 ("*Notice*").

however, the Commission must modify its rules to equalize the bargaining power of microwave incumbents and PCS licensees, while preserving appropriate protections for microwave incumbents.

I. ARGUMENT

A. The Commission Should Permit Independent Cost-Sharing Agreements.

The Commission proposes a cost-sharing plan which sets the reimbursement cap at $250,000 per microwave link, with an additional $150,000 cap if construction of a tower is required. The cost-sharing plan also includes creation of an industry-sponsored clearinghouse mechanism that will administer and manage the cost-sharing obligations of PCS licensees that benefit from the spectrum-clearing efforts of other licensees.[3]

Many commenters support the creation of a cost-sharing plan which determines the financial obligations of PCS licensees with respect to the clearing of spectrum and the relocation of microwave incumbents.[4] These commenters, however, also strongly support the creation of rules that permit private party agreements which are formed independent of the FCC's cost-sharing

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[3] *See Notice* at ¶ 63.

[4] *See* Comments of AT&T Wireless at 2; Comments of BellSouth Corp. at 3; Comments of CTIA at 4; Comments of Omnipoint Communications, Inc. at 1; Comments of PCIA at 27; Comments of Pacific Bell Mobile at 2; Comments of Southwestern Bell Mobile at 8.

mechanism.[5] The award of the "A" and "B" broadband PCS licensees has enabled parties to begin constructing their systems and relocating microwave incumbents whose systems are located within the service area of the new PCS provider. It also has enabled licensees to identify adjacent PCS licensees who may be affected by a single incumbent. Already AT&T Wireless, WirelessCo., PhillieCo., PCS PrimeCo., and GTE Mobile have entered into a cost-sharing arrangement. Their voluntary cost-sharing agreement incorporates many of the principles advanced by the FCC's plan, *i.e.*, reimbursement costs may not exceed the reasonable limit set by contract for reimbursement, relocation costs must directly relate to the costs of relocation and may not include "premium payments." Private-party contracts advance the process of relocation. Moreover, pursuant to the *Notice*, PCS licensees are advised that they are free "to negotiate alternative cost-sharing terms."[6] Therefore, the FCC should not restrict the creation of market-based cost-sharing agreements.

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[5] *See* Comments of AT&T Wireless at 3; Comments of CTIA at 5; Comments of GTE at 9; Comments of Pacific Bell Mobile Systems at 6; Comments of PCS PrimeCo. at 11, 14; Comments of Sprint Telecommunications Venture at 24, 31; Comments of UTC at 10.

[6] *See* Comments of PCS PrimeCo. at 14, citing *Notice* at ¶ 29.

B. The Commission Should Adopt a Single Interference Standard and Begin Depreciation on the Date a Licensee Acquires Reimbursement Rights.

In addition, the FCC should adopt guidelines regarding the interference standards to be employed by carriers in determining if a subsequent PCS licensee has an obligation to reimburse the initial PCS licensee for relocation.[7] The interference guidelines adopted by the Commission in this proceeding should apply to all carriers regardless of whether the carrier participates in the FCC's clearinghouse mechanism for cost reimbursement or enters into private cost-sharing arrangements with other PCS licensees.

Further, as part of the cost-sharing process, the date that the PCS licensee acquires its reimbursement rights should be the date on which depreciation of a PCS licensee's reimbursement rights should begin to toll.[8] As illustrated in the *Notice*, the amount of reimbursement is derived by amortizing the cost of relocating a particular link over a ten-year period[9] and

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[7] *See* Comments of PCS PrimeCo. at 12 (use of the 10-F interference standard is not required, which presents the possibility of dispute since different interference standards can yield different results); Reply Comments of Southwestern Bell Mobile Systems at 6, 7.

[8] *See* Reply Comments of Southwestern Bell Mobile Systems at 8.

[9] *See Notice* at ¶ 25.

depreciation begins on the date that the first PCS licensee obtains reimbursement rights.[10] On that date the PCS licensee has completed relocation and the provision of PCS service is "technically" feasible. The appropriate time frame to begin evaluating the value of the reimbursement rights obtained from microwave incumbents should be at the point that PCS licensees can possibly begin offering services to the public. Therefore, the value of the reimbursement right should begin to toll on the date that reimbursement rights are acquired.

C. The Clearinghouse Should be Managed by a Neutral Third Party.

CTIA supports creation of a clearinghouse which should be managed and administered by an independent, neutral body. The administration of the clearinghouse must be competitively neutral and governed by an independent entity which does not have represent the interests of any party. No matter how principled, an industry association may create the appearance of favoritism toward one party or group. A better solution is to allow qualified parties to bid and allow the lowest bidder to operate the clearinghouse.[11]

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[10] *See id.* at ¶¶ 25, 30.

[11] A qualified party is an impartial entity who does not hold an FCC license and not filed comments in these proceedings.

D. "Good Faith" Negotiations Should be Required During the Voluntary Negotiation Period.

The current rules establish a two-year period for voluntary negotiations which began on April 5, 1995, concomitantly with the acceptance of the "A" and "B" broadband PCS license applications.[12] The Commission has not established any parameters for negotiations during the voluntary period.[13] Some incumbents are taking the position that they are not required to engage in "good faith" negotiations during the voluntary negotiation period.

If an agreement is not reached during the two-year voluntary period, a PCS licensee may initiate a one-year mandatory negotiation period, at which time microwave incumbents must negotiate in "good faith" or become subject to penalties for failure to accept an offer of comparable facilities.[14] Such

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[12] *See Notice* at ¶ 12. The negotiation periods for the C, D. E, and F blocks will be announced in the future by the Wireless Bureau through public notices.

[13] *Id.* at ¶ 68, citing 47 C.F.R. § 94.59(b); *see also* In the Matter of Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *Third Report and Memorandum Opinion and Order ("Opinion and Order")*, ET Docket No. 92-9, RM-7981, and RM-8004, FCC 93-351, released August 13, 1993, 8 FCC Rcd 6589 at ¶ 15.

[14] *See Notice* at ¶ 12.

failure creates an rebuttable presumption that the incumbent is not acting in "good faith."[15]

CTIA supports the requirement that negotiations during the mandatory negotiation period must be in "good faith." Similarly, CTIA supports strengthening the rules for the voluntary negotiation period.

As CTIA documented in its initial comments,[16] many PCS licensees are encountering difficulties in reaching agreement with microwave incumbents during the voluntary negotiation period. Many commenters agree that the voluntary negotiation rules must be modified.[17] Under the current rules, incumbents have no incentive to negotiate because the rules limit the bargaining power of PCS licensees. This imbalance favors the incumbents and results in requests for excessive fees and other unreasonable demands. The microwave incumbent justifies these demands in reliance on the FCC's rules that do not specify appropriate conduct of parties during the voluntary negotiation period. The lack of a "good faith" standard during the voluntary negotiation period facilitates the unconscionable demands made by some incumbents.

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15 *See id.* at ¶ 69.

16 *See* Comments of CTIA at Exhibit I.

17 *See* Comments of AT&T at 15; Comments of CTIA at 7.

The FCC can modify the voluntary negotiation period by shortening the voluntary negotiation period to one year, extending the "good faith" requirement into the time remaining for the voluntary period, or requiring incumbents to bear their own costs of relocation at the conclusion of the voluntary negotiation period (similar to the plan adopted by the Canadian government).[18] Modification of the voluntary negotiation period will not frustrate the spirit of the FCC's microwave relocation rules. On the contrary, it will equalize the bargaining power of the incumbents and PCS licensees, thereby facilitating rapid relocation and deployment of PCS services and products to the public.

Further, consistent with CTIA's recommendation to create incentives for successful negotiations during the voluntary negotiation period, PCS licensees should not be required to provide "state-of-the art" technology after the conclusion of the voluntary negotiation period as suggested by Tenneco Energy.[19] The rule states that the incumbent is entitled to "comparable facilities," not something better. Incumbents should not be rewarded for dilatory actions in thwarting the negotiation process.

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[18] *See* Comments of CTIA at 9.

[19] *See* Comments of Tenneco Energy at 9.

E. The Commission Should Define More Specifically the Term "Comparable Facilities."

The lack of a definition of the term "comparable facilities" has contributed to disagreements between microwave incumbents and PCS licensees. More specificity regarding comparability will provide clarity to the rules and assist the negotiation process.[20] In its initial comments, CTIA recommended that "comparable facilities" mean "facilities whose overall quality is equal within a reasonable range so that both voice and data users will perceive no qualitative difference between the original and replacement facilities."[21] This definition includes principles found in the "equal access" portions of the *Modification of Final Judgment* which requires equivalent, but identical facilities.[22]

F. Returning Incumbents to Their Original Spectrum and Continued Licensing of Microwave Services in the 2 GHz Band Thwart the Relocation Process.

Allowing microwave incumbents to return to their original spectrum at the conclusion of the 12-month test period further thwarts the relocation process. Such a rule provides incumbents with yet another tool to further prolong a lengthy relocation

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[20] *See* Comments of PCIA at 17; Comments of Sprint Telecommunications Venture at 23; Comments of Southwestern Bell Mobile at 3.

[21] Comments of CTIA at 10-11.

[22] *See id.* at 10.

process. If relocated, incumbent licensees are entitled to "comparable facilities."[23] The rule, however, does not demand that incumbents must be returned to their original position. Although the requirement to provide "comparable facilities" within the test period is not extinguished once an incumbent is relocated, it does not mean that incumbents are entitled to return to their original position. The requirement imposed upon PCS licensees to provide "comparable facilities" is sufficient accommodation of the incumbent microwave licensees. If "real" problems exist at the end of the test period, the PCS licensee should be required to correct the problems, but should not be required to return the microwave operator to its original position within the 2 GHz band.

In addition, CTIA favors the cessation of continued licensing of microwave services in the 2 GHz band. The rights of the 2 GHz microwave incumbents must be tolled on April 4, 2005. Continuation of licensing is a breach of faith to the PCS licensees that have invested millions to provide the next generation of wireless services to the public. PCS licensees must be assured that their services will not be compromised by the continual grant of co-primary licenses in the 2 GHz band.

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[23] *See Notice* at ¶ 70.

Any additional primary licensing in the 2 GHz band will only delay relocation of microwave incumbents.[24]

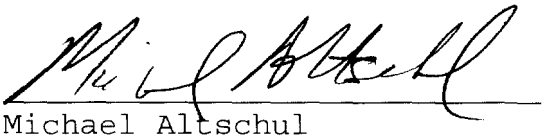
II. CONCLUSION

Currently, microwave incumbents have no incentive to negotiate with PCS licensees during the two-year voluntary negotiation period. Moreover, other rules permit microwave incumbents to stall the process of relocation. CTIA urges the FCC to modify or clarify the microwave relocation rules to balance the bargaining positions of microwave incumbents and PCS

[24] *See* Comments of AT&T at 13; Comments of GTE Mobile at 19; Comments of National Rural Electric Cooperative Association at 7; Comments of PCIA at 22; Comments of PCS PrimeCo. at 19.

licensees, and create stronger incentives for rapid relocation of 2 GHz microwave incumbents.

Respectfully submitted,



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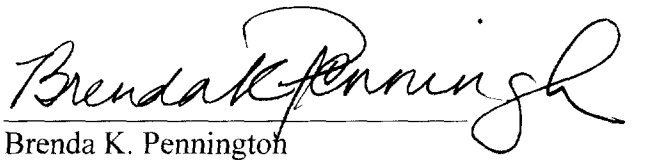

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